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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No. 733

RICHARD DONALD COSTELLO,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Richard Donald Costello petitions that a writ of certiorari issue to review a judgment entered against him on November 4, 1963 by the United States Court of Appeals for the Ninth Circuit in a cause pending in that court numbered and entitled "No. 18699 Richard Donald Costello, Appellant v. United States of America, Appellee" (R 492). The said judgment (R

499) and opinion (R 492 to 498) affirms a judgment of conviction and a sentence of 10 years in the penitentiary (R 31) imposed upon petitioner on Nov. 10, 1960 by the United States District Court of the District of Alaska for violation of 21 USC 176(a) (receive, conceal and facilitate the importation of marijuana, knowing the same to be imported).

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1. OPINIONS OF LOWER COURTS

The first appeal in this case resulted in the opinion *Costello v. US*, 298 F2d 99, R 72.

The present appeal resulted in an opinion not yet reported, set forth at R 492.

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2. STATEMENT OF JURISDICTION

a. The judgment sought to be reviewed was made and entered November 4, 1963 (R 499).

b. A petition for rehearing was denied December 10, 1963 (R 500).

c. The United States Supreme Court has jurisdiction to review the judgment of the Court of Appeals for the Ninth Circuit by certiorari under 28 USC 1254(1).

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3. QUESTIONS PRESENTED FOR REVIEW

a. In applying the presumption of importation of 21 USC 176(a) though the record contains evidence sufficient to sustain a finding contrary to the presump-

tion, the Court of Appeals held contrary to *N.Y. Life Ins. Co. v. Gamer*, 303 US 161, 171, which holds that a presumption is inoperative if the record contains evidence sufficient to sustain a finding contrary to the presumption.

b. In holding that the statutory presumption applies despite *government's evidence* which tended to contradict the presumption, the Court decided contrary to the holding of the Fifth Circuit on a similar presumption in *Stone v. US*, 223 F2d 23 (presumption under 1939 Internal Revenue Code, 1939-26 USC 2593 (a)).

c. In holding that the presumption of importation was constitutional on a record showing availability of marijuana in the U.S. (and that this was manicured marijuana) the Court of Appeals held contrary to the due process clause of the Fifth Amendment to the United States Constitution and contrary to *Tot v. US*, 319 US 463.

d. In holding that past convictions from testimony of informers engaged in crime (prostitution) are in themselves sufficient corroboration of reliability and make a search reasonable under the IVth Amendment to the U.S. Constitution the Court of Appeals for the Ninth Circuit goes contrary to the opinion of Judge Bazelon, of the District of Columbia Circuit in *Jones v. US*, 266 F2d 924, 925.

e. In holding that evidence of happenings six years before is not too remote to constitute corroboration and make a search recoverable under the IVth Amendment to the U.S. Constitution, the Court of

Appeals of the Ninth Circuit went contrary to the holding of the Court of Appeals of the Sixth Circuit in *Worthington v. US*, 166 F2d 557.

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4. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

21 USC § 176(a) *Smuggling of marihuana; penalties; evidence; definition of marihuana*

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to au-

thorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

U.S. Constitution, *Amendment IV—Searches and Seizures*

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Constitution, *Amendment V*

"No person shall * * * be deprived of life, liberty, or property without due process of law * * *"

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5. STATEMENT OF CASE

The facts of the case appear generally in the two opinions of the Court of Appeals (298 Fed 99, R 72; R 492).

The appellant was prosecuted under 21 USC 176 (a).* (There were also charges under other statutes.

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*Count III, R. 27-8

"that on or about the 3rd day of May 1958, . . . Richard Donald Costello with intent to defraud the United States did knowingly receive, conceal and facilitate the transportation and concealment of certain merchandise, to-wit, forty-two (42) marijuana cigarettes, which Richard Donald Costello knew had been imported and brought into the United States contrary to law; in violation of Section 176(a) of Title 21, United States Code Annotated.",

but the Court of Appeals affirmed under this statute only.)

Federal agents seized marijuana on appellant's person acting on the "tip" of one Laura Jensen (Jerry Coe), who was herself engaged in prostitution (R 387:1-4). No evidence of importation was submitted by the government, but the prosecution relied on the presumptions in 21 USC 176(a), quoted above. The defense put on no evidence. *One of the government's witnesses (Ringstrom)* testified that marijuana grows "all over the United States" and that it is "very easy to raise" (R 276, the testimony quoted second opinion, R 496-7). The same government witness also testified that it was "manicured" marijuana (R. 271-2, 277). After remand pursuant to the first opinion (298 Fed 99, R 72) the "tip" of the informer was "corroborated" by the testimony of officers that she was "reliable"—although none could name a single instance, except one 6-year old case.

The Court of Appeals affirmed the conviction for "receiving, concealing and facilitating the transportation of marijuana, known to be imported" (Supra, page 5, note.)

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6. JURISDICTIONS OF FEDERAL COURT

The indictment was brought under 21 USC 176(a). *One of appellant's points is that the record does not show a federal offense* or *jurisdiction of the U.S. District Court.*

The Court of Appeals had jurisdiction under 28 USC 1291.

7. REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

a. *Presumption of Importation Applied Contrary to Rule of N. Y. Life Ins. Co. v. Gamer,* 303 US 161.

(1) The lower courts applied the presumption of importation of 21 USC 176(a) notwithstanding that the *government's testimony* that *marijuana grows all over the United States* is sufficient to sustain a finding contrary to the presumption (added to this is also the government's testimony that the marijuana here was "manicured"):

(2) *N. Y. Life Ins. Co. v. Gamer,* 303 US 161, 171 says,

> "The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed".

Yee Hem v. US, 268 US 178, concerned opium, and there was no testimony, least of all from the government, that opium grows in the United States.

(3) (a) Certiorari will be granted where the decision of the Court of Appeals is in apparent conflict with a decision of the United States Supreme Court.

Monroe v. Pape, 365 US 167, 170;

Radiant Burners v. Peoples Gas L & Com. Co., 364 US 656, 659;

US v. Seaboard Airline Ry., 361 US 78, 79;

S. W. Sugar & Molasses Co. v. River Terminals Corp., 360 US 411, 414;

Mageneau v. Aetna Freight Lines, 360 US 273, 274;

Harris v. US, 359 US 19, 21;

Heflin v. US, 358 US 415, 416-417.

(b) Certiorari granted for importance in enforcement of federal narcotics laws.

Harris v. US, 359 US 19, 21.

(c) Certiorari granted because of importance of effect on administration of criminal justice.

Carbo v. US, 364 US 611, 612.

b. (1) *Conflict with Fifth Circuit on Related Statutory Presumption* in *Applying Presumption when Contradicted by Government Evidence.*

In *Stone v. US,* 223 F2d 23, 25, the Fifth Circuit held a related presumption inapplicable where contradicted by the *government's* evidence.

(2) Certiorari granted where decision of Court of Appeals contrary to decisions of the Supreme Court and another Circuit on related question.

Grisham v. Hagen, 361 US 278, 279.

c. *Conflict with Tot v. US, 319 US 463 in holding Presumption Constitutional as applied.*

(1) The presumption in 21 USC 176(a) is made by the statute to disappear only if an explanation is introduced by the *defendant.* Nothing is said about an explanation or contrary evidence by the *government.* The *Gamer* rule, supra, or the Fifth Circuit's principle in *Stone v. US,* 223 F2d 23 would each limit the presumption and avoid the constitutional issue.

If these rules be not applied, then we submit, that on a record like the present, where the government's evidence is sufficient to sustain a finding contrary to the presumption, the presumption violates the due process clause of the Vth Amendment in that there is no rational connection between the evidence and the presumption. *Tot v. US*, 319 US 463, 466. The Court of Appeals cites the illegality of marijuana in Alaska and California (R 497-8). But once it is shown that marijuana grows in the United States, there is no presumption that it is legally possessed. See *Tot v. US*, 319 US 463, 468.

> ". . . there is no presumption that a firearm was lawfully acquired . . ."

In fact, if we start with illegality of possession under state law, what the presumption of importation does is not to establish the offense but to establish that the offense is federal rather than state (or territorial)—i.e., to establish federal jurisdiction. *Thus federal jurisdiction is made to rest on a presumption*, and is not established without the presumption. And the *government's evidence* is sufficient to sustain a finding contrary to the presumption.

d. *Conflict with District of Columbia Circuit (Judge Bazelon) in Holding "Tip" of Persons Engaged in Crime Sufficient Corroboration of Reliability from Previous Record of Convictions.*

On the question whether the "tip" of the informer was sufficiently corroborated to constitute probable cause under the IVth Amendment to the U. S. Constitution the Court of Appeals says that previous con-

victions are enough in themselves (although none of the government witnesses could name a case). The Court of Appeals for the Ninth Circuit expressly rejects Judge Bazelon's view in *Jones v. US*, 266 F2d 924 that previous convictions are alone not enough, because one never knows beforehand when the "tip" is genuine and when fabricated. Judge Bazelon said (266 F2d 924, 928):

> "The reliability of such persons is obviously suspect. The fact that their information may have produced convictions in the past does not justify taking their reports on faith. Like the roundly condemned ancient practice of approvement, the present informer practice amounts to condoning felonies on condition that the confessed or suspected felon brings about the conviction of others. Under such stimulation it is to be expected that the informer will not infrequently reach for shadowy leads, or even seek to incriminate the innocent."

The citation in N. 15 of Hopkins, *Our Lawless Police* (p. 109) shows that the same principle is applied to condoning misdemeanors, in particular, prostitution.

Not only is there a conflict with at least one judge of the District of Columbia Circuit, but the question whether the "tip" of such an informer is sufficient to establish probable cause solely on the basis of past convictions, represents an important question in the administration of the narcotics laws. (The Court of Appeals of the Ninth Circuit treats its opinion as being in conflict with Judge Bazelon's opinion, and that is the fact. The informer, Laura Jensen (Jerry

Coe), was engaged in prostitution but had never been arrested (R 391, 394-6)).

e. *Conflict with Sixth Circuit as to Whether Occurrence Six Years Before is Too Remote to Give Corroboration Supporting Probable Cause.*

Apart from recent prostitution convictions which no witness could name, the prosecution relied on the informer's tip in the *Cody* case in 1952—six years before appellant's arrest on May 3, 1958.

The Ninth Circuit sweeps away *Worthington v. U.S.*, 166 F2d 557 (CCA 6) as not being concerned with the reliability of an informer. But the case is concerned with the reliability of six-year old events as constituting possible corroborations for information claimed to justify a search and seizure. The precise question was whether the arrest of a girl on a narcotics charge at appellant's house of prostitution was corroboration for appellant's own arrest at the same house on a similar charge six years later. The Sixth Circuit held events six years before to be too remote to furnish corroboration (166 F2d 557, 566).

In the present case the question is whether a "tip" on a case six years before can be used as corroborating the reliability of an informer so as to make a search "reasonable" under the IVth Amendment. We submit that the present case conflicts with the Sixth Circuit on a related point. Certiorari should be granted accordingly.

8. CONCLUSION

The writ of certiorari should be granted and upon full hearing the judgment of the Court of Appeals should be reversed.

Dated, San Francisco, California,
January 4, 1964.

Respectfully submitted,
GEORGE OLSHAUSEN,
Attorney for Petitioner.

(Appendices A and B Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

RICHARD DONALD COSTELLO, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 18,699 Nov. 4, 1963

Appeal from the United States District Court
for the District of Alaska

Before: ORR, HAMLEY and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

This is the second appeal in this matter, our first decision being reported in *Costello v. United States*, 29[illegible] F.2d 99. We there remanded, directing that the trial court hold a hearing "confined to the reliability of the informant as it relates to the issue of probable cause for the arrest." At that hearing, the name of the informant was disclosed, but she was not available to testify, being apparently outside of the jurisdiction. The government presented the testimony of four witnesses. The defendant presented no testimony. The court made findings as follows: The informant, during a period from the fall of 1951

until 1953 or 1954, supplied representatives of the United States Marshal's office with information on narcotics, prostitution and other matters, and the information thus supplied was found to be reliable. In 1952 the informant supplied the Marshal's office, and particularly deputy marshal Thompson, with information which led to the arrest and conviction of one Cody on a narcotics violation and with information which was relayed by the Marshal's office to a Treasury Agent at Anchorage, and resulted in the arrest and conviction of one Childress on a narcotics violation. The informant left Alaska in 1953 or 1954 and returned in November of 1957. At that time she was introduced to officer Calhoon of the Territorial Police by Thompson, who told Calhoon about his use of the informant and that he had found her information to be reliable. In addition to acting as an informant in the present case, she also furnished officers Calhoon and Sundberg with information pertaining to the names and addresses of prostitutes in Fairbanks, and this information proved to be reliable. The court concluded that the informant was reliable, that the officers, Calhoon and Sundberg, who participated in Costello's arrest, knew or had reasonable grounds to believe that she was reliable, and that Costello's arrest was based upon probable cause.

On this appeal Costello asserts that the findings are not supported by the evidence. In considering this question we apply the "clearly erroneous" rule by analogy to rule 52(a) F.R.Civ. P., 28 U.S.C.; *United States v. Page*, 9 Cir., 1962, 302 F.2d 81, 85. Appel-

lant relies upon language used by us in our prior opinion in this matter. (*Costello v. United States, supra,* at 101.) There we said that when a "tip" is relied upon to establish probable cause there must be a substantial basis for crediting the hearsay or a record of accurate and reliable information, in short, a previously reliable informant. Appellant also relies upon *Jones v. United States,* 1960, 362 U.S. 257, 269 where the Supreme Court said that an officer "may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." The Court there cited *Draper v. United States,* 1959, 358 U.S. 307. In *Draper* the corroboration consisted in the occurrence, under the observation of the officers, of certain events which the informant had predicted, and the officers' observation of the events was held to be sufficient corroboration to warrant reliance upon the informant's tip.

Appellant asserts that there is no such corroboration here, and we agree. The only real corroboration of this kind occurred after the arrest, and as we pointed out in our prior opinion at page 101, the ultimate corroboration provided by the fruits of the search cannot be used retroactively to justify the arrest.

This, however, is not the end of the matter. Here, there was another kind of corroboration. The Court had before it the testimony of Thompson who had used the informant in the Cody case and found that

the information that she gave was accurate. His testimony is that he told officer Calhoon about this experience and this testimony is confirmed by Calhoon. In addition, there is testimony by Thompson, Calhoon and Sundberg that each of them, before the arrest of Costello, had received information from the informant regarding prostitution in the Fairbanks area, which information they had checked out and found accurate. It was brought out on cross-examination that so far as the witnesses could recall, none of this information led to an arrest or conviction, and that the witnesses could not recall specific instances by name. The reasons given for this lack of recollection were two, first, that the witnesses were testifying in 1963 and the events involved occurred before the arrest of Costello in the spring of 1958, some five years before and, second, that prostitution is a misdemeanor and, consequently, they did not keep the same kind of records as to the information gleaned from the informant that they would have kept in connection with more serious matters. It is urged that this destroys their testimony as to information given by the informant relating to prostitution matters. We think not. It goes to the weight of the testimony and, of course, the Court could have disbelieved the officers if it were convinced that their stories on this subject were fabrications. The Court's findings, however, show that it believed them and we cannot say that these findings are clearly erroneous.

It is urged that the two specific cases to which the officers or some of them referred, namely the Cody

and Childress cases, cannot be taken into account as indicating reliability of the informant because they are too remote, the Cody case, at least, having occurred in 1952, and also because in the Childress case the officers did not know of their own knowledge that the informant's tip had proved out, but had gotten this information from other officers in Anchorage. These contentions we must also reject. They, too, go to the weight of the testimony and the Court's findings show that it believed the officers and accepted their testimony. We did not, in our prior opinion, use the word "record," which appellant stresses, in any technical sense. The case of *Worthington v. United States*, 6 Cir., 1948, 166 F.2d 557, relied upon by appellant for the proposition that the Cody case is too remote, does not sustain that proposition. The question of the reliability of an informer was not involved in that case at all.

Our holding is that there are at least two means by which the credibility of an informant may be established. One is by corroborating external circumstances occurring in the course of the very case that is at issue, as happened in the *Draper* case, *supra*. The other is the fact that on prior occasions in other cases the informant has given information which turned out to be reliable. It is the latter type of corroboration that exists here, and that we hold to be sufficient. We are cited to no case to the contrary, although there is language to that effect, with which we do not agree, in the separate opinion of Judge Bazelon in *Jones v. United States*, D. C. Cir., 1959,

266 F.2d 924, 925. In *Cervantes v. United States*, 9 Cir., 1959, 263 F.2d 800, we stated in fn. 8 at page 804:

> "The rule formulated by the cases is that information received from an outside source . . . will not suffice to show probable cause unless such source is believed to be reliable, or unless it has substantial verification or supplementation in facts personally known to the officer or officers."

See also *Butler v. United States*, 9 Cir., 1959, 273 F.2d 436, 441, 443.

Appellant also asserts, as he did on the prior appeal, that the presumption of importation in 21 U.S.C. §176(a)[1] and the presumption stated in 26 U.S.C. §4744(a)[2] are invalid. Appellee asserts that these questions are no longer open because, in the prior appeal, our remand directed the district court to hold a hearing confined to the reliability of the informer. It is concluded from this that all other questions were impliedly decided adversely to appellant. This, we think, does not follow. In ordering a remand, we followed the procedure used by the Su-

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[1] "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

[2] "Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a)."

preme Court in *United States v. Shotwell Mfg. Co.*, 1957, 355 U.S. 233. We stated that if the Court found the informant reliable it should enter a new final judgment based upon the record as supplemented by its further findings "thereby reserving to appellant the right to further appellate review." The *Shotwell* opinion contained an additional clause: ". . . including respondent's right to have reviewed by the Court of Appeals alleged errors in the original trial which that Court did not reach in the previous appeal." While we did not use this language, we think that our prior opinion implies that the appellant should have the same right. In that opinion we did not discuss the question now presented because we ruled in favor of appellant, on the state of the record then before us, on the issue of reliability of the informant. The question of the validity of the two presumptions above mentioned, was however, briefed and argued on that appeal. It was not disposed of then and we are of the opinion that it is open now.

As to the presumption created by 21 U.S.C. §176 (a), appellant's argument is that the testimony in the case contradicts the presumption. He relies upon the testimony of two witnesses. One of them, Barkley, a state police investigator, was asked on cross-examination if he knew where marijuana comes from, and answered: "From a plant." He was then asked if he knew where these plants grow, and answered: "Not exactly. I have heard that they grow all over." The other, Ringstrom, a retired chemist of the Alcohol Tax Unit of the Treasury Department, identified the

marijuana involved in this case and testified to certain chemical tests that he had used to verify the fact that it was marijuana. On cross-examination, he testified that he was unable to tell by chemical tests from what country any particular marijuana came and he then gave the following testimony:

> "Q. Well, would you state what information you have relative to this general distribution and the growth areas?
>
> A. It grows all over the United States, Mexico, Europe, the southern part of Asia, and northern part of Africa; as far as I know, it grows over the major part of the world in the warm climates and the temperate climates.
>
> Q. Is it a difficult plant to raise?
>
> A. It is very easy to raise.
>
> Q. And does any part of the plant have commercial use?
>
> A. Where it is grown and harvested for definite purposes; yes, it does.
>
> Q. And is there any way known to you that it could be either chemically or botanically determined whether a given stalk or portion of a stalk or leaves of marijuana was grown in the United States or in some foreign land?
>
> A Not that I know of."

He further testified that the marijuana cigarettes in question contained "portions of the leafy portion of the plant rather than a portion of the seed and a portion of the fibrous structure of the plant itself."

Costello makes two arguments, one, that the statute is unconstitutional on its face and, two, that in the

light of the testimony that we have quoted, any presumption that the particular marijuana here involved was imported has no rational basis in fact. We reject the first argument; we have heretofore held that the statute is constitutional. (*Caudillo v. United States*, 9 Cir., 1958, 253 F.2d 513; *Butler v. United States*, 9 Cir., 1959, 273 F.2d 436; compare *Agobian v. United States*, 9 Cir., 1963, ... F.2d .....

Appellant's second argument is based upon the contention that the record shows (a) that marijuana "grows all over the United States . . . in the warm climates and the temperate climates," and (b) that the particular marijuana here in question was "manicured," i.e., made up entirely of leaves, and that in the *Caudillo* and *Butler* cases we took note of the fact that while "unmanicured" marijuana is seldom produced in the United States, "manicured" marijuana is seldom imported. The record in this case contains no such evidence. In *Caudillo* we pointed out that we know of no medical or scientific use to be made of marijuana, save perhaps for occasional testing in order to make scientific comparisons with other narcotics, barbiturates and amphetamines. We also noted that the growing of marijuana is illegal in several states including California (the state there involved), and that by far the larger part of all marijuana found within the United States is imported. In Alaska, as in California, the growing or possession of marijuana is illegal. (See Michie's Alaska Statutes, §§17.10.010, 17.10.230(4), (12) and (13)). The fact that the marijuana involved in *Butler* and *Caudillo*

was "unmanicured" was simply an additional factor entering into the decision in those cases.

Those cases certainly establish the proposition that the mere fact that marijuana can be and is grown in the United States does not render the statute invalid. The only additional fact suggested here is that the particular marijuana appears to have been "manicured." However, this fact alone is not enough to require a decision that the statute is invalid as applied to Costello. In *DeRose v. United States*, 9 Cir., 1963, 315 F.2d 482, we pointed out no attempt was made to make a record as to the conditions or restrictions under which the drug there involved, methadon, may lawfully be possessed or used, if at all, the quantity produced in the United States, the extent of importation as compared to United States production, or other facts on the basis of which a decision could properly be made. Such a record, in relation to cocaine-hydrochloride, was made in *Erwing v. United States*, 9 Cir., 1963, ____ F.2d ____, and we held a comparable statute invalid as applied to that drug. Whether a similar showing can be made in relation to "manicured" marijuana we do not decide, because, as in *DeRose*, no such showing was made here. We hold that on this record we cannot say that the statute is unconstitutional either on its face or as applied to this case.

Costello was convicted on three counts, the first two of which charged violation of section 4744 of Title 26, U.S. Code. The third charged violation of section 176(a) of Title 21. He was sentenced to five years on

each of counts one and two, and ten years on count three, all sentences concurrent. Under these circumstances, the sentence on count three being valid, we need not further consider counts one and two. Hence, we need not pass upon the validity of the presumption stated in 26 U.S.C. §4744(a). (See *Gonzales v. United States*, 9 Cir., 1963, ... F.2d .....)

Affirmed.

(Endorsed) Opinion Filed Nov. 4, 1963.

Frank H. Schmid, Clerk.

Appendix B

(298 F.2d 99)

United States Court of Appeals
For the Ninth Circuit

RICHARD DONALD COSTELLO,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 17,213
Jan. 10, 1962

Appeal from the United States District Court
for the District of Alaska

Before: ORR, HAMLEY and DUNIWAY, Circuit Judges

ORR, Circuit Judge:

Appellant Costello was allegedly engaged in the narcotics "racket" in Alaska. He was arrested, tried before a jury and found guilty. He now challenges the validity of the judgment of conviction on the ground that he was subjected to an illegal search and seizure during which two packets of marijuana cigarettes were seized and later introduced into evidence. One of the packages was taken from his person at the time of his arrest and the other was thrown

by appellant to the floor of his small public office during the process of the arrest.

The two main contentions with which we are presently concerned are: First, that the search during which the marijuana was discovered was not incident to a lawful arrest on a valid warrant; second, that the officers at the time the arrest was made did not have probable cause to believe that appellant was in possession of marijuana, and that the court in testing that question on the motion to suppress erred in refusing, after appellant requested it, to require the government to disclose the name of an alleged informant on whose "tip" the probable cause was said to be based.

This case is, in essential factual respects, very similar to the case of Taglavore v. United States, 291 F.2d 262, recently decided by this court. In the Taglavore case we held that the procurement of a warrant for a traffic violation was under the circumstances there shown a mere sham and subterfuge and did not authorize the narcotics search. The government concedes that the Taglavore case precludes its reliance on the traffic warrant in this case as authority for this arrest and search.

At the hearing on the motion to suppress it was shown that five officers were present at the arrest, search and seizure. Appellant resisted; force was employed to the extent that appellant was struck on the head with the policemen's side-arms and became so saturated with blood that the jailers refused to admit him when he was presented for incarceration.

The trial court denied the motion to suppress and found that the arrest was lawful and the search reasonable.

It is now settled that a search made incident to a valid arrest may be reasonable though made without a warrant. The case establishing this proposition is closely analogous to the present one, and the reasons given for sustaining the validity of the search there are fully applicable here:

"(1) the search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited;[1] (3) the room was small and under the immediate and complete control of the [appellant]; (4) the search did not extend beyond the room used for unlawful purposes; (5) the [concealment of the drug under these circumstances] was a crime . . ." United States v. Rabinowitz, 339 U.S. 56, 64 (1950). Indeed, in the instant case, there was not a typical "search" of the room, but only of appellant's person, since the first packet, which was retrieved from the floor, had been disclosed by appellant himself.

Nor were the arrest and search rendered invalid because of the use of force. The officers were on warning that appellant might forcibly resist arrest.[2] This expectation was confirmed when, without provocation

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[1] They were surely not expressly invited for this occasion by Costello, however, and he undoubtedly would warmly dispute the presumption. (Footnote not in original)

[2] The local authorities had previously received an FBI report of a stateside arrest of Costello in which he had assaulted the arresting officer and had offered substantial resistance to being taken into custody.

other than the very announcement of arrest, appellant charged and began to grapple with the officers in an effort to escape. The officers were justified in using such force as under the circumstances was reasonably necessary to effect the arrest or prevent the escape of appellant. Stinnett v. Commonwealth of Virginia, 55 F.2d 644, 645 (4th Cir. 1932). "When the state sends an officer forth to arrest a felon, she says to him to make the arrest peaceably if he can, forcibly if he must." 55 F.2d at 647.

But in the instant case, before the search could be authorized there must have existed probable cause for the arrest. As a basis for probable cause, the government relies principally upon an alleged "tip" received by one of the arresting officers immediately prior to the arrest. This "tip," that "Dick has it in right and left pockets," is said to have come from a confidential informant and to have been relayed by radio to the arresting officers at the scene prior to the arrest. The "tip," if reliable, was sufficient to establish probable cause. Draper v. United States, 358 U.S. 307 (1958).

"Probable cause" has been defined as "facts and circumstances . . . such as to warrant a man of prudence and caution in believing that the offense has been committed . . ." Locke v. United States, 7 Cranch 339 (1813), Carroll v. United States, 267 U.S. 132, 161 (1925). The alleged "tip," upon which virtually sole reliance is here placed, would, if reliable, have warranted a man of prudence and caution in believing that a narcotics offense had been committed, but the reliability of the informant is the controlling factor.

All the cases in which a "tip" has been heavily relied upon to establish probable cause have stressed the need for "a substantial basis for crediting the hearsay," Jones v. United States, 362 U.S. 257, 269 (1960), or a record of "accurate and reliable information," Draper v. United States, 358 U.S. 307, 313 (1958); in short, "a previously reliable informant," Espinoza v. United States, 278 F.2d 802 (5th Cir. 1960). Prudent and cautious men would not act in so decisive a fashion in reliance on an uncorroborated anonymous caller, and there is nothing in this record to show that the present informant was anything more than that.[3]

The so-called "informer's privilege," invoked to prevent disclosure of the identity of an informant, has been established in recognition of the need by law enforcement officials for sources of citizen information which will remain available only with some assurance of freedom from coercion or retaliation by persons ultimately brought to justice as the result of a "tip." This "privilege" is not absolute, however, and occasionally the price of invoking it will be the dismissal of a case because of the inadmissibility of evidence, the source of which is not subject to challenge due to the invocation of the "privilege." The "privilege" must give way when a challenge of the informant is essential to the proper disposition of the case. The determination of the validity of an

[3]We need not labor the point that the ultimate corroboration provided by the fruits of the search cannot be used retroactively to justify the arrest. Johnson v. United States, 333 U.S. 10, 16 (1948).

arrest, search and seizure is essential to such a disposition. Wilson v. United States, 59 F.2d 390, 392 (3d Cir. 1932). The Wilson case was cited approvingly by the United States Supreme Court in Roviaro v. United States, 353 U.S. 53, 61 (1957) in support of the following language:

"Most of the federal cases involving this [fairness] limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication."[4]

The customary check imposed upon arrest, search and seizure is the advance judicial check by the magistrate called upon to issue warrants. This check must occasionally yield to the necessity of quick action, in which case the magistrate's pre-arrest judgment is momentarily delegated to the enforcement officer who evaluates his basis for probable cause. The courts then exercise a post-arrest check on the actual existence of that probable cause. This latter check would not be effective if it looked no further than the uncorroborated tip of an anonymous informant. To stop the inquiry there, would be to delegate the usual ad-

[4]See also United States v. Keown, 19 F.Supp. 639 (W.D. Ky. 1937), United States v. Blich, 45 F.2d 627 (D. Wyo. 1930), and discussion by Judge Bazelon in Jones v. United States, 266 F.2d 924, 927-930 (D.C. Cir. 1959) and authorities there cited.

vance judicial check not to the enforcement officer, but to the informant, and all with no ultimate judicial check whatever. This cannot be done. Whether the issuance of a warrant by a magistrate at the pre-arrest hearing in primary reliance upon a tip would be proper, we need not decide, for other inherent safeguards present at such a hearing are obviously not present in a situation such as the instant one. See Jones v. United States, 362 U.S. 257, 271 (1960). It is enough to observe that in this situation, a reasonable opportunity for the appellant to challenge the reliability of the informant must be permitted on the motion to suppress, or no real judicial check would ever take place. The refusal of the trial court, upon appellant's request, to require disclosure of the name of the informant under these circumstances was error.

The error occurring at the hearing of the motion, the question arises as to what form of relief should be afforded appellant. It is evident that the need for a grant of a new trial is dependent upon the ultimate finding on the existence of probable cause for the arrest, search and seizure, after a hearing on the motion free from the error we have pointed out. If after further hearing the court finds that the informant was in fact reliable, then the evidence seized was properly admitted at the original trial. On the other hand, if the government does not disclose the identity of the informant, or if it does so, and the court finds him unreliable, then the disputed evidence should have been suppressed, and a new trial should be granted.

Accordingly, we vacate the judgment and remand the case to the District Court for a hearing confined to the reliability of the informant as it relates to the issue of probable cause for the arrest. The District Court shall make findings of fact on that issue. If that court finds the informant reliable and that probable cause is therefore established, it shall enter a new final judgment based upon the record as supplemented by its further findings, thereby preserving to appellant the right to further appellate review. If, on the other hand, disclosure of the informant's identity is not forthcoming, or if the court finds the informant unreliable, it shall grant appellant a new trial. This procedure will fully safeguard appellant's rights. It has been repeatedly followed by the United States Supreme Court in like cases. See Killian v. United States, 368 U.S. [illegible] (1961), 30 U.S.L.Week 4047 (12/11/61); Campbell v. United States, 365 U.S. 85 (1961); and United States v. Shotwell Mfg. Co. 355 U.S. 233 (1957).

The case is remanded for further proceedings consistent with this opinion.

(Endorsed) Opinion Filed Jan. 10, 1962.

Frank H. Schmid, Clerk.